COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1765-CR **Cir. Ct. No. 2010CT97**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAWN M. HACKEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN and DAVID WAMBACH, Judges. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Dawn M. Hackel appeals a judgment of conviction for operating a motor vehicle while under the influence of an intoxicant

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(OWI) and operating with a prohibited alcohol concentration (PAC), third offenses, and an order denying her motion for postconviction relief. Hackel argues she is entitled to a new trial because (1) she was denied the right to an impartial jury and a fair trial due to comments made by a prospective jury member and her trial counsel during voir dire; and (2) she was denied the constitutional right to the effective assistance of counsel when trial counsel failed to move to strike the entire jury panel following those comments. Alternatively, Hackel argues a new trial is warranted in the interest of justice.

¶2 We conclude that, because Hackel has failed to show that the comments made by the prospective juror and her trial counsel impermissibly and prejudicially tainted the jury, Hackel received a fair trial by an impartial jury. Additionally, we conclude that Hackel has failed to establish that her trial counsel's performance was prejudicial and thus her ineffective assistance of counsel claim fails. Finally, we conclude that Hackel is not entitled to a new trial in the interest of justice. We affirm.

BACKGROUND

¶3 The State charged Hackel with OWI and PAC, as third offenses. The case proceeded to a one-day jury trial.

¶4 Voir dire began the morning of trial. At the end of voir dire, Hackel's trial counsel asked the voir dire panel whether anyone on the panel believed that Hackel must be guilty of "something" because she was charged with a crime and the matter was being tried. At first, no one responded to the question. Then, one of the voir dire panel members, Robert Whitehouse, a deputy with the Waukesha County Sheriff's Department, asked to have the question repeated. Counsel repeated the question and asked, "if there's anything that would cause

you to think that because Ms. Hackel is a criminal defendant facing a jury trial that she must be guilty of something to have gotten her to this place." Whitehouse responded, "No." Another potential juror then stated the following, and a discussion followed:

> Potential Juror Stocke: I would say the State could possible—had probable cause for her being in this position right here, so obviously there was something that she violated against the State to put her in this position right here. So in response to your question, the State feels she did something wrong, that's why she's here.
>
> Ms. Keane: That's right. And thank you.
>
> Potential Juror Stocke: So she broke the law in the State of Wisconsin or she would not be in this position, so, maybe that's the wrong—maybe I'm thinking this a little wrong, but—
>
> Ms. Keane: However you're thinking, it is the right way to think it.
>
> Potential Juror Stocke: Okay, if you'd ask the same question again, maybe my thoughts would change. I interpreted your question that the reason why she is here because—you know—something—she broke some law, that's why she is here. The State has caused—I should say, is cause is the answer, probable cause.
>
> Ms. Keane: Right. And you're absolutely right procedurally and legally and in every way—
>
> Potential Juror Stocke: Right.
>
> Ms. Keane: —that the State believes that Ms. Hackel has broken a law.
>
> Potential Juror Stocke: Right.
>
> Ms. Keane: My question to you is as she faces a jury trial—
>
> Potential Juror Stocke: Okay.
>
> Ms. Keane: Right. She is presumed to be innocent. Now, your statements and I appreciate your being forthright about that.

> Potential Juror Stocke: Mm-hmm.
>
> Ms. Keane: They know what they are doing.
>
> Potential Juror Stocke: Mm-hmm.
>
> Ms. Keane: They have evidence and because they have accused her, she must have violated some law.
>
> Potential Juror Stocke: That's my thought, yes.
>
> Ms. Keane: Is there anybody else who agrees with Mr. Stocke?
>
> (Potential juror[s] raised hands.)

¶5 Two individuals, along with Whitehouse, were among those potential jurors who raised their hands to this question. Hackel's trial counsel then engaged in a discussion with the three potential jurors on the topic of whether Hackel must be guilty because the State brought charges against her and the case was proceeding to trial. During the course of this discussion, Hackel's counsel engaged in the following discussion with Whitehouse:

> Ms. Keane: Okay. And Mr. Whitehouse, I'll ask you the same question because you agreed initially although perhaps tepidly.
>
> Whitehouse: I think I'm a little impartial [sic] given the fact myself have arrested drunk drivers. I know the probable cause you need. I know the procedures you need to follow. I know the evidence that you need to gather and, in fact, I have testified as a deputy on drunk driving cases as well. Okay. So, for the State to bring this on, I believe that there's sufficient evidence and they are confident that the evidence that they have is to prove that she's guilty so—
>
> Ms. Keane: And you say sufficient evidence, sufficient evidence that she is guilty.
>
> Whitehouse: Mm-hmm.
>
> Ms. Keane: So because of your—umm—professional training and your occupation, you believe that the State has sufficient evidence to convict her—umm—

> and so based on those—your understanding of those facts as they stand, do you believe that Ms. Hackel is therefore guilty of what she's alleged to have done?
>
> Whitehouse: Yes.

¶6 Based on his answers to trial counsel's questions, Whitehouse was struck from the voir dire panel for cause. The trial was held and the jury found Hackel guilty of both charges. Hackel appeals.

DISCUSSION

¶7 Hackel makes three arguments on appeal: (1) she did not receive a fair trial by an impartial jury because statements by Whitehouse and her trial counsel tainted the jury; (2) she did not receive effective assistance of counsel because counsel failed to strike the entire tainted voir dire panel; and (3) in the alternative, she is entitled to a new trial in the interest of justice. We discuss and reject each argument in turn.

1. The Jury Panel was not Tainted by Comments from a Prospective Juror and her Trial Counsel

¶8 A criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and WIS. CONST. art. I, § 7, as well as the principals of due process. ***State v. Louis***, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). Whether a criminal defendant has received a fair trial is a constitutional question that we review de novo. *See* ***State v. Vanmanivong***, 2003 WI 41, ¶17, 261 Wis. 2d 202, 661 N.W.2d 76.

¶9 Hackel claims that during voir dire, members of the voir dire panel heard "prejudicial and misleading commentary" from Whitehouse and her trial counsel. In support, Hackel points to two statements made during voir dire, one

from Whitehouse and the other by trial counsel. The first challenged statement comes from Whitehouse. Hackel argues that Whitehouse's statement that, based on his training and experience "as a deputy [sheriff] on drunk driving cases," it was his belief that the State had sufficient evidence of guilt. She contends that this answer, among others, constituted impermissible vouching testimony from an expert. Hackel argues that because the jury heard these comments, the jury panel was tainted.

¶10 The other challenged statements come from Hackel's trial counsel during voir dire, which, Hackel contends, "impermissibly vouched for the strength of the [S]tate's case." Trial counsel told the voir dire panel that the "State has evidence and they think it is rock solid evidence." Hackel also points to counsel's question to the voir dire panel, where counsel asked whether anyone "believe[d] that the fact that the State has made the decision to charge and to go all the way to jury trial and spend these resources, … who believe[d] that that means that Ms. Hackel is in violation of the law?"

¶11 In response, the State argues that Hackel has not shown that any member of the voir dire panel was tainted, short of mere speculation, and as a result Hackel cannot show that she did not receive a fair trial by an impartial jury. The State maintains that the voir dire proceedings worked properly to screen out biased prospective jurors. We agree with the State.

¶12 At the outset, we disagree with Hackel that Whitehouse's comments were akin to "impermissible vouching testimony" from an expert. Whitehouse did not testify; he merely answered questions posed to the voir dire panel. Although Whitehouse went into considerably more detail about his why he was unable to put aside his beliefs that Hackel must be guilty, we see no meaningful difference

between his answers and Stocke's answers, one of the members of the voir dire panel who also expressed difficulty with remaining open to hear the evidence before judging Hackel. Moreover, the cases Hackel relies on in support of her argument are inapposite. Unlike this case where a member of the voir dire panel simply answered questions put to him during voir dire, these cases involved testimony from witnesses, which is evidence a jury may consider in determining the guilt or innocence of a defendant.

¶13 To the extent that some members of the voir dire may have been prejudiced by Whitehouse's answers and trial counsel's comments during voir dire, we note that trial counsel specifically probed the panel members on whether they could listen to the evidence, decide the case only on the evidence heard at trial, and return a verdict based on the evidence that is fair to Hackel. According to the record, none of the remaining panel members answered in the negative. In addition, at the beginning of the trial, the court instructed the jury to "keep an open mind throughout the trial, [reach] your conclusion only during your final deliberations after all of the evidence is in and you've heard the attorneys' closing arguments and [the court's] instructions on the law." To the extent that any juror chosen to sit on this panel might have been tainted by Whitehouse's statements, this was cured by the above questions asked by counsel during voir dire and the court's instruction to the jury prior to the presentation of evidence.

¶14 We also disagree with Hackel's unsupported assertion that Whitehouse's comments vouched for the strength of the State's case and "tainted the jury's overall perspective of the [S]tate's evidence heading into trial" or that it "tend[ed] to cause the jury to give greater weight to the [S]tate's witnesses." This argument is just a rehash of her first argument. We fail to see the distinction

between the two arguments, and therefore, we reject this argument for the same reasons that we rejected her first argument.

¶15 Hackel also contends that trial counsel's questions during voir dire "vouched" for the veracity of the case against her. In particular, Hackel directs our attention to the following statement from her counsel from the transcript:

> The State has evidence and they think it is rock solid evidence. I want to know … who on the jury panel believes because the State has rocks—believes it has rock solid evidence against Ms. Hackel that on some level that's enough?
>
> ….
>
> … Who believes that the fact that the State has made the decision to charge and to go all the way to jury trial and spend these resources, right, who believes that means Ms. Hackel is in violation of the law?

¶16 Hackel's contention that these questions somehow strengthen the credibility of the State's case is absurd. These questions are typical of the questions jurors are asked in criminal trials. The idea behind asking questions like these during voir dire is to root out any jurors who may have prematurely judged the defendant before hearing any evidence, the court's instructions, and arguments by counsel.

2. Ineffective Assistance of Counsel

¶17 To establish an ineffective assistance of counsel claim, Hackel must satisfy a two-part test. First, she must show that her counsel's performance was deficient. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Second, she must prove that "the deficient performance prejudiced the defense." ***Id.*** To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694. If Hackle fails to meet either the deficient performance or prejudice prong, we need not address the other prong. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶18 Hackel contends that trial counsel performed deficiently by failing to move to have the entire voir dire panel struck following Whitehouse's challenged answers and after counsel made "comments that appeared to endorse that view of some panel members that [] Hackel must be guilty." This argument fails on its own weight. Hackle cannot honestly expect counsel to make such a motion after she made her challenged comments. Effectively, counsel would be asking the court to strike the panel because of her own purported ineffectiveness. As for Whitehouse's answers, we have already concluded that there is no reason to believe that any member of the voir dire panel was prejudice in some unspecific way by his answers. Because Hackel has failed to establish the prejudice prong, we need not address whether counsel was deficient. *See* ***id.***

3. Discretionary Reversal

¶19 Finally, Hackel requests that we exercise our discretionary power of reversal pursuant to WIS. STAT. § 752.35, on the ground that the controversy was not fully tried. This argument rests on her previous rejected contentions that she was denied the right to an impartial jury and that her counsel was ineffective. We may order a new trial under § 752.35 if we conclude that the real controversy has not been fully tried, and we exercise this power of reversal "only sparingly" and "only in exceptional cases." ***State v. Prineas***, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206; ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98. Because Hackel's arguments for why we should exercise our

discretion and reverse the judgment hinge entirely on the success of her arguments regarding a tainted jury and ineffective assistance of counsel, which we have rejected, we see no reason to do so here.

¶20 Based on the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.